Canada's Native People - Their rights have been denied.

by

Prof. K. Lysyk

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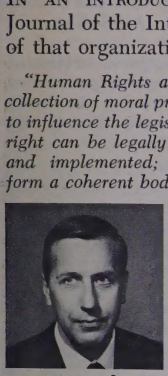
Canada's Native People — Their rights have been denied*

by PROF. K. LYSYK

IN AN INTRODUCTORY NOTE TO THE MOST RECENT NUMBER OF THE Journal of the International Commission of Jurists, the Secretary-General of that organization states that:

"Human Rights are no longer a stray collection of moral principles which ought to influence the legislature. Every human right can be legally defined, interpreted and implemented; human rights now form a coherent body of law."



K. Lysyk

It is this theme of the relationship between human rights and the law that I wish to explore — not in general, philosophical terms, but in relation to the laws in force in this country and the human rights of a particular group of Canadians, the Indians and Eskimos.

It will not be necessary to enter upon nice questions concerning the definition of particular "human rights". Instead, I shall make reference to three or four articles in the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations in 1948.

The human rights I shall refer to are not the only ones which invite comment, and I should perhaps make particular mention of one topic that I am omitting. I have in mind Article 25(1) of the Universal Declaration which states that:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumtsances beyond his control."

Few will deny that conditions of life for most of Canada's native peoples fall far short of meeting this standard. The statistics speak for themselves. I by-pass this aspect of human rights, not because it is unimportant — but because the consequences of economic underprivilege are not borne by Canadians of native ancestry alone, and also because, with one qualification I shall add in a moment, it does not appear to me to be essentially a *legal* problem.

THE QUALIFICATION IS THIS: THE PROvision of the kind of services contemplated by Article 25 of the Universal Declaration is, in Canada, a matter which falls generally within provincial, not federal, responsibility. But there has been a widely held assumption that provincial laws of this kind could not extend to Indians on reserves. The reserve has sometimes been regarded as a sort of enclave of foreign territory, so that provincial laws of any kind, and provincial services, it is said, must stop at the boundaries of the reserve. I have attempted to show elsewhere (see Hawthorne-Tremblay report) that this "territorial theory", as it were, could not be justified as a matter of constitutional law, and that the explanation for provincial policy must be found in historical and political — not constitutional — considerations. In any event a section of the present Indian Act, dating back to 1951, has the effect of delegating any necessary constitutional authority to the provinces. But tradition dies hard, and the slowness on the part of provincial governments to admit their responsibilities toward Indians — in particular, reserve Indians — has contributed to the plight in which the latter now find themselves.

I do not wish to be misunderstood. I do not say that the federal government should abandon Indian affairs to the provinces. For one thing, under the constitution the power to legislate for the administration of Indian *lands* is exclusively a federal matter, and there is nothing in the Indian Act to alter that situation. But putting to one side reserve management and land questions generally, I would not wish to be interpreted as saying that the federal government should be absolved from responsibility for the welfare of Indians, or even that it should be absolved from that responsibility at such future time as it might be shown that Indians in all the provinces had achieved the benefit of all the services extended to non-Indian residents of the provinces. There would still be a continuing federal responsibility to provide supplementary services.

EVIDENCE ACCUMULATES THAT IN AREAS such as education and employment, bridging the gap between the position occupied by the group with the lower social and economic status on the one hand, and the rest of society on the other, will not be accomplished merely by removing legal obstacles to equality of treatment. Preferential treatment may be required, to take just one example, in the form of special compensatory educational programmes, and the Constitution undoubtedly justifies a federal role in such areas for the benefit of the Indian and Eskimo. But whatever the initiatives that might be undertaken by Ottawa, the provincial governments should not evade their own responsibilities to provide all native peoples within provincial boundaries with the same social services that are extended to the other citizens of the provinces.

I have touched on the matter of equality in a restricted sense — in the sense that unequal treatment arises from the simple fact that the Indian or Eskimo frequently is obliged to look to federal laws, administered from Ottawa, in situations in which his non-Indian neighbour is subject to provincial laws, and to a provincial administration. Let us now look a little more closely at this concept of equality. Article 7 of the Universal Declaration states, in part, that:

"All are equal before the law and are entitled to equal protection of the law."

The language invites comparison with section 1(b) of the Canadian Bill of Rights guaranteeing "equality before the law and the protection of the law", without discrimination by reason of such factors as race or colour.

Extended comment on this provision of the Canadian Bill of Rights would be premature at this time. The decision of the Supreme Court of Canada in the case of *Regina* v. *Drybones*, presently pending before that Court, will tell us a good deal about the reliance that can be placed on the "equality" clause and, indeed, on the Canadian Bill of Rights as a whole. This case involves a challenge to the validity of the liquor provisions of the Indian Act, precisely on the ground that Indians are treated unequally by being prosecuted under a different statute than would be applied to a non-Indian on identical facts. Joseph Drybones is from Yellowknife, and if he were not an Indian he would have been charged under the Territorial Liquor Ordinance, instead of the Indian Act. He can point to the fact that the

*An address delivered at the ninth annual meeting and conference of the Indian-Eskimo Association of Canada.

1969

penalties under the Indian Act are stiffer. There is the additional fact that the Indian Act prohibition is against being intoxicated "off a reserve", and since there are no reserves in the Territories that prohibition presumably would apply to his conduct, anywhere — even in his own home!

THE IMMEDIATE FATE OF THE LIQUOR provisions in the Indian Act is of secondary importance, for it appears likely that proposed amendments to the Indian Act will include a repeal of these sections. But the decisions in the *Drybones* case may well have ramifications, beyond the immediate issue, for other provisions of federal law which might be thought to be discriminatory.

It is true that some of the more obvious examples of discriminatory laws have disappeared from the statute books in recent years — such as the voting restrictions which were dropped from the Canada Elections Act in 1960. The revision of the Indian Act now in process will no doubt see the end of some other measures which have treated Indians differently from others for reasons which are no longer convincing; the example of the liquor provisions has already been mentioned.

Tougher problems remained to be resolved in this area. There can be a question as to whether a particular provision which appears to give preferential treatment to Indians does not, in the long run, operate in a way that is disadvantageous to them. It has been suggested that this is the case with the section which prevents property situated on a reserve from being seized to satisfy a judgement for debt, because it tends to discourage businessmen from extending credit to reserve Indians..

Before I leave the question of equality under the law, may I take note of one extra-legal factor. It has to do with not the state of the law, but with popular misconceptions of what the true legal position of the Indian is. It can be a very real problem for the Indian who may, for the purpose at hand, stand in exactly the same legal position as a non-Indian, but who is dealt with differently, or perhaps not dealt with at all, because the other party misunderstands the law. It is not difficult to find examples of such misconceptions, sometimes in surprising places. To illustrate, one book on Canadian commercial law, which is widely used in teaching law to the layman, states flatly that Indians living on reserves are legally incapable of binding themselves by contract, even for necessaries. This statement is very misleading because in general the reserve Indian has exactly the same capacity to enter binding contracts that anyone else has. Moreover, like anyone else, he is subject to being sued on his contract just like anyone else. The source of this particular misconception is probably the limited exemption, already mentioned, which prevents property on the reserve being seized. But that has nothing to do with capacity to contract, or with liability to being sued. It does not even protect property situated, or wages earned, off a reserve from being seized to meet a judgement against the Indian.

PHOTO BY R. HAAS

"Indians are Canadian Citizens"

Again, there is a tendency to repeat catch phrases — such as the familiar reference to those of native ancestry as being "wards of the Crown" — without stopping to inquire precisely what legal implications are supposed to be drawn from that description.

MY POINT IS SIMPLY THIS. MOVING toward equality of treatment by reforming the law is one thing. But beyond that, to promote equality of treatment by one's fellow citizens it may be necessary to devote some attention to promoting awareness of what the true state of the law is, for there are few areas of Canadian law in which misconceptions flourish to the extent they do in connection with "Indian Law" — and that is so whether one is speaking of Indians in the broad constitutional sense (which includes Eskimos), or in the sense of an Indian within the meaning of the Indian Act, or of non-status Indians, or of treaty as opposed to non-treaty Indians, reserve or off-reserve Indians.

I might just add parenthetically that sometimes an unfortunate choice of language in our laws has itself contributed to misunderstanding. For example, a section in the Indian Act provides that an Indian demonstrate his capability of *assuming* the duties and responsibilities of citizenship. There can be no doubt that Indians are in fact Canadian citizens. To the extent this provision suggests that an Indian does not become a Canadian citizen until he gives up Indian status, it is misleading.

To return to my central theme of human rights and the law, I should like to refer once again to the Universal Declaration of Human Rights. Article 8 provides that:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

This article reflects the principle, very much part of our own legal tradition, that a right which cannot be enforced in a court or other tribunal is not really a right at all in the proper sense of the word. Where there is a "right", you must have an effective remedy so that the right may be vindicated.

Let us consider this requirement for a moment in relation to another principle which lies at the very foundation of both our own system of law and of international law. It is frequently expressed in the form of the latin maxim, *pacta sunt servanda* — agreements are to be honoured. The principle is that no one shall have a right to go back on his word, to repudiate unilaterally what he has undertaken to do.

WHAT DOES THE RECORD SHOW CONcerning agreements made with the Indians? It seems hardly necessary to remind Canadians that undertakings made to the Indians — solemn treaty promises — have been ignored, and have been broken. I need not re-trace the line of cases which have held that treaty guarantees of hunting and fishing rights have been overridden by the Migratory Birds Convention Act. Very recently a majority of the Supreme Court of Canada arrived at the same result in the *Daniels* case on appeal from Manitoba, where there was the additional factor of a constitutional guarantee supplied by the British North America Act of 1930 — a guarantee, however, which the majority of the Court said was applicable only against provincial laws and was of no avail as against federal legislation.

But before leaving the question of hunting and fishing rights guaranteed by treaty, I should like to make one observation. I have occasionally heard it remarked that since Indians are no longer dependent on taking game and fish to stay alive, it does not really matter that the treaty promises have not been respected. But does this not make a mockery of that very principle which forms the bedrock of our legal tradition — that *agree-*

ments must be honoured? What, I wonder, would be the consequences if Canada decided to conduct her international relations on the basis that she would only honour those treaty promises which she thought were essential to the well-being of the country she had made promises to, regardless of what that other country might itself think about the matter?

To suggest that Indian treaty promises can be ignored, without the consent of the Indians, because those rights are unimportant anyway, seems to me to combine what our courts have pointedly described as a breach of faith, with an attitude which is suggestive of high-handed paternalism, if not downright arrogance.

WHAT OF THE SITUATION WHERE THERE have been no treaties at all entered into with the Indians, in spite of an understanding that such treaties would be negotiated? In 1912 Quebec's boundaries were extended northward to take in "New Quebec" and you will find identical provisions in the Quebec and federal statutes enacted in that year dealing with the boundaries extension whereby Quebec undertook to recognize the rights of the Indian inhabitants in the newly organized territory, to obtain surrenders of such rights from the Indians, and to bear the expense of obtaining such surrenders. And yet, more than half a century later, no treaties of surrender have been negotiated with the natives of northern Quebec.

I now return to the point at which I commenced this discussion of Indian treaties — that is, the 8th Article of the Declaration of Human Rights, with its reference to "the right to an effective remedy by the competent national tribunals." Do the Indians have the right to seek redress in the ordinary courts of law for breach of treaty promises, or for failure to negotiate treaties at all for the surrender of Indian rights?

There is, in fact, very little authority on the question of the extent to which Indian treaty promises are enforceable against the Crown. It must in any event, be recognised that there are difficult legal hurdles to be cleared — both of procedure and of substantive law — before an action brought by the Indians concerned could hope to succeed.

In the course of the foregoing remarks on Indian treaties I touched on the subject of land claims, and in connection with the latter I should like to make just one more reference to the Universal Declaration of Human Rights. Article 17 provides that:

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

There are two classes of problem that come to mind in connection with arbitrary deprival of Indian lands.

One relates to questions of improper administration or wrongful disposal of Indian reserve lands. It is almost impossible to say anything useful in general terms about this type of claim, for the result will hinge on complex questions relating to the class of reserve, and the particular facts concerning the way in which those reserve lands were treated. It can be noted, however, that in this sort of case one of the major problems confronting Indian claimants is the very great practical difficulty in attempting to establish the facts within the strict rules of evidence imposed by law. It is in the nature of this kind of case that what records and documents there are will generally be in the hands of the Crown.

THE OTHER CLASS OF CLAIM RELATES TO those areas of Canada in which no surrenders of Indian title have been taken. I have already commented on the situation in northern Quebec. The greater part of British Columbia has never been formally surrendered by the Indians, and a court action concerning this very question will, I understand, be coming before the courts in a few months' time. The result will have direct implications for the Yukon, where again no treaties for surrender of Indian title have been negotiated.

I cannot now enter upon the complex legal problems which arise in connection with unsurrendered Indian title. But I should like to make one point which would be trite were it not so commonly lost sight of. It is simply that the question of extinguishment of native title is not one which has been unique to Canada. It is one which has arisen elsewhere, including countries which share our common law heritage — other countries in the Commonwealth, and the United States. If this is kept in mind, if we take advantage of the opportunities for comparative study, we shall obtain a broader perspective, and this, in turn, may enable us to avoid the sort of wrong turning in the law that can so easily occur, and which can take so long to correct.

With reference, still, to this matter of the availability of effective remedies for violation of rights, there is another area in which comparative research might prove to be particularly worthwhile. The list of proposed legislation referred to in the Speech from the Throne included a bill to establish an Indian Claims Commission. Enactment of this measure will constitute the most significant development in Canadian Indian law for many years. It will be important to study the proposed legislation carefully to ascertain what changes in the legal ground rules it makes — and, perhaps, what changes might have been, but are not being made. Here we can hope to benefit particularly from the experience of our neighbours to the south, where legislation establishing an Indian Claims Commission was enacted more than twenty years ago, and where there has been a good deal of jurisprudence developed, as well, under a string of congressional enactments dealing with the claims of particular tribes.

In conclusion, I hope that I have managed to convey an idea of the dimensions of the task involved in ensuring that effective legal remedies are made available for breach of these rights, so that the law will in fact recognize these claims as rights and not merely as pleas for charitable treatment.

Arithmetic of Shame

A FULL CENTURY FROM OUR BIRTH AS A nation, the statistics of our stewardship to the Indian comprise an arithmetic of shame.

Mel Hurtig, the Edmonton publisher, has compiled figures which illustrate the drastic dimensions of the problem:

- the death rate among pre-school Indian children is eight times that of white children.
- the life expectancy of a Canadian Indian is 34 years; the national average is 62 years.
- 46 percent of Indian families earn less than $1,000 a year.
- 50 per cent of Indian children fail to reach Grade 7; 61 per cent fail to reach Grade 8; 97 per cent fail to reach Grade 12 and there are now only 150 in university across Canada. (If they were admitted on a basis proportionate to white students, there would be 2,600.)
- in Saskatchewan, where they comprise 3 per cent of the population, they comprise 80 per cent of the female prisoners.

Yet despite this degradation, the Gallup Poll revealed in 1968 that only one in three Canadians felt that our national attitude to the Indians required change. Perhaps our consciences have been inured by the dozens of inquiries into Indian affairs that have reached conclusions, filed reports, made recommendations and gathered dust.

— *Toronto Daily Star*

The Rights of Working Women

by LITA-ROSE BETCHERMAN *

AT THIS POINT IN TIME, WOMEN ARE A DISADVANTAGED GROUP IN THE WORK force in our society and there is a growing opinion that they require the authority of the law to equalize their position.

Female workers in Canada are protected against discrimination only in the area of wages and salaries; they have no legal remedy with respect to hiring, conditions of employment such as fringe benefits and transfers, or lay-off and dismissal. All other groups who are liable to discriminatory treatment are covered by Fair Employment Practices legislation. In Ontario this is provided by the Ontario Human Rights Code. Canada ratified Convention 111 of the International Labour office which declares the principle of equal opportunity in employment for all persons including females. But when it came to translating this declaration into federal and provincial legislation, the word "sex" was omitted from the list of prohibited bases of of discrimination.

This omission was not made with any sinister intent. Canada just did not take its female labour force seriously in the late 1950's and early sixties. Women were still regarded as temporary workers, just passing through office or factory on their way to the altar. In reality this was an example of a cultural lag, for in 1961 women already accounted for over one-quarter of the Canadian labour force.

As 1970 approaches, however, it is no longer possible not to take very seriously the role of women in our economy. This is particularly true in Ontario, where 40% of the female labour force is located, for a total of almost one million women workers. A few statistics speak forcefully. Women account for two-thirds of the office workers, one-half of all service workers and one-third of sales personnel. Some industries are dependent on women. Office, schools, and hospitals would be deserted if all female workers styed home. In 1967 the percentage of women in Ontario's work force was 32% and rising. Economists predict that by 1980 women will be 35% of all workers. Other industrialized countries, such as Great Britain, United States, France and Sweden, have already shot past this mark.

THE PHENOMENAL RISE IN FEMALE LABOUR force participation is a result of a combination of events. At the same time as the sparse depression crop of babies hit the labour market, the business expansion of the 'fifties and 'sixties created an unprecedented demand for workers. Accordingly, the economy, here and abroad, tapped the only reservoir of labour that existed — the married woman. Today 60% of Ontario's women workers are married and the working wife has given a new permanence to the female labour force. Statistically, women can now be expected to have a working life of twenty-five to thirty years. Moreover, they are not retiring before the invasion of the labour market by the post-war babies. The numbers of working women are increasing and will continue to increase, largely because the type of work women do is expanding. The educational, health, and recreation services are growth areas of the economy, along with the commercial and financial sectors: these are the industries where women work.

Where one of every three workers is female, it is reasonable and no more than simple justice to ban job discrimination based on sex. The Women's Bureau is constantly reminded of how this legislative gap infringes upon a woman's fundamental right to work. We hear many complaints of job discrimination. For example, a female chemist complained that she had been refused work at several hospitals because she was a woman. A policewoman claimed that she had to pay a higher insurance premium than male constables to get equivalent coverage for her dependants. Recently, the most common ground for complaint has concerned discrimination against married workers — a surprising vestige from the days when the female labour force was young and single. In many plants, women are automatically dismissed at the time of marriage, with the tacit or expressed consent of their union. In one company, forced resignation of married women was written into the collective agreement. A dismissed worker with courage challenged this policy and took her case to the Ontario Labour Relations Board; but with no violation of contract and no legislation prohibiting such discrimination, the Board understandably had to find against her.

IF THE WORKING WIFE MEETS DISCRIMINATION, the single woman fares worse. Female professional and technical workers tend to remain single (57% as compared with 40% of all female workers). They have the same commitment to a life-time career as their male colleagues, yet they are segregated in the lower ranks of their professions. At the recent National Human Rights Conference in Ottawa, Honourable J. C. McRuer decried the prejudice that keeps women lawyers off the bench, and added that there are women who would have made better judges of the Supreme and County courts than the men who were appointed.

Of all the working women, however, the ones most vulnerable in the face of sex discrimination are the sole-support mothers. (In 1961 there were almost 95,000 households in Ontario where a woman was the family head). While many are on welfare, others are striving to support their families. Even by the outmoded standards of the "breadwinner clause mentality", these women workers "deserve" the same job opportunities as men.

All over the world there is a rapidly growing awareness of the injustice meted out to countless women workers. International agencies like the UN and ILO have pointed the way. The 1958 ILO recommendation, referred to above sought to abolish discrimination on the basis of sex as well as other grounds. Because sex discrimination has proved so hard to eradicate, the United Nations General Assembly, in November 1967, unanimously passed a special "Declaration on the Elimination of Discrimination Against Women", of which Article 10 deals specifically with equal rights in economic life.

The first country to legislate equal employment opportunities for women was the United States. In 1964 Congress passed an amendment to the Civil Rights Act — the famous Title VII which prohibits discrimination in employment based on sex among other grounds. The need for this legislation has been proved by the response. The enforcement agency for Title VII — the Equal Employment Opportunity Commission — reports that about a third of its case-load are sex-based complaints. These cover all manner of discriminatory employment practices.

*Mrs. Lita-Rose Betcherman is Director of the Women's Bureau of the Ontario Department of Labour.

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